

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by WILLIAMS
Commissioner

Feb. 3, 2015

PAUL MORAN v. BABCOCK & WILCOX
INDEMNITY INS CO OF N AMERICA (INA INS), Insurance Carrier
ESIS, INC, Claim Administrator
Jurisdiction Claim No. VA00000558282
Claim Administrator File No. C540C9220904
Date of Injury December 18, 2011

Robert E. Evans, Esquire
For the Claimant.

Scott C. Ford, Esquire
For the Defendants.

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

Both parties request review of the Deputy Commissioner's September 23, 2014 Opinion awarding medical benefits and temporary total disability benefits beginning on April 21, 2014 and continuing. We AFFIRM in part, REVERSE in part and MODIFY.

I. Material Proceedings

The claimant, a uranium recovery maintenance specialist, sustained a compensable injury by accident on December 18, 2011. By Award Order dated April 11, 2012, the claimant was awarded medical benefits for "[m]ultiple injuries to the head" and wage loss benefits from December 19, 2011 through February 12, 2012. The claimant filed a change in condition claim on October 1, 2013 seeking temporary total disability benefits continuing from August 23, 2013 and medical benefits to include a traumatic brain injury with neurocognitive deficits. Subsequent

claims requested authorization of treatment provided by Joseph Conley, Ph.D., and Gregory O'Shanick, M.D. The defendants raised numerous defenses against the claim, including that there was no traumatic brain injury and that treatment rendered by Drs. Conley and O'Shanick was not reasonable, necessary or causally related to the occupational injury. The defendants also asserted that Dr. O'Shanick's office was located too far from the claimant's residence to be considered reasonable. Lastly, the defendants disputed that the claimant was disabled as alleged and argued that he failed to adequately market his residual work capacity.

The Deputy Commissioner conducted an evidentiary hearing on July 2, 2014. He found that the claimant suffered a traumatic brain injury with accompanying neurological deficits and expanded the medical award to include such. He explained:

Weighing the medical evidence presented, adopting a view animated by reason, we find the clinical criteria enlisted by Dr. Conley persuasive. We find his opinion worthy of significant evidentiary weight. Dr. O'Shanick's expertise, his extensive explanation, and the myriad sources considered when reaching his deductions, lead us to afford great weight to his opinion as well. Dr. Ross, without challenging or disputing the determinations registered by Drs. Conley and O'Shanick, recognized claimant sustained a traumatic brain injury with a "modest" aggravation to underlying cognitive issues.

To Dr. Peck's findings we accord little weight. His methods questioned, his causal assertions challenged by physicians specializing in such areas, his conclusions markedly distinct when compared to those reached by Drs. Conley, O'Shanick, and Ross, we do not find Dr. Peck's opinion persuasive.

So to the threshold issues presented, whether claimant suffered a traumatic brain injury and whether the neurocognitive deficits distinguished by Drs. Conley and O'Shanick are related to an endured traumatic brain injury, the corresponding conclusions reached by Drs. Conley, O'Shanick and Ross assemble a compelling force overwhelming the roundly questioned opinion reached by Dr. Peck.

(Op. 8.) (footnote omitted.) The Deputy Commissioner held that treatment provided by Drs. Conley and O'Shanick was reasonable, necessary and authorized. He noted that

“Dr. Conley’s treatment [was] necessary to address the possible scope of injury sustained by claimant, plainly related to the workplace accident and authorized by Dr. Joseph, the treating neurologist.” (Op. 11.) Additionally, the Deputy Commissioner found that care rendered by Dr. O’Shanick was causally related and necessary, and that since the defendants disputed causation and refused to provide treatment, the claimant was free to seek treatment with him. Lastly, the Deputy Commissioner awarded continuing temporary total disability benefits beginning on April 21, 2014 based upon Dr. O’Shanick’s opinion. He explained that the claimant was partially disabled prior to April 21, 2014 and failed to reasonably market his residual work capacity.

Both parties request review. The claimant requests review of the denial of temporary total disability benefits from February 10, 2014 through April 20, 2014. The defendants request review of (1) the awarding of benefits for a traumatic brain injury, including continuing temporary total disability benefits as of April 21, 2014, (2) the finding that Dr. O’Shanick’s treatment was reasonable, necessary and authorized, (3) the authorization of Dr. O’Shanick’s treatment given the distance the claimant must travel to treat with him, and (4) the designation of Dr. Conley as a treating physician.

II. Summary of Evidence

At the hearing, the claimant testified that, on December 18, 2011, he fell and struck the back of his head on a concrete floor.¹ He said that he lost consciousness. The claimant agreed that he returned to his pre-injury employment eight weeks after the accident (March 2012).

¹ The claimant’s wife and a friend testified regarding their perceptions of the claimant’s behavior before and after the accident.

The claimant denied having a head injury prior to December 18, 2011. He said that, after the accident, he had difficulty remembering procedures, including work requirements, and could not comprehend instructions. The claimant submitted documentation of his occupational performance and incident reports for years before and after the incident. (Cl.'s Exs. 8 & 9.) The claimant stated that his condition has worsened with time. He said that he sought treatment with Dr. O'Shanick based upon Dr. Conley's referral.

The claimant testified to beginning his job search on February 10, 2014 and registering with the Virginia Employment Commission.² He stated that he completed applications or left a business card at approximately 24 recommended businesses. (Cl.'s Ex. 10.) The claimant submitted a handwritten list of his contacts. He stated that he stopped searching for employment when Dr. O'Shanick excused him from such "either the first or second visit" and as noted within Dr. O'Shanick's records. (Tr. 77.) Regardless, the claimant agreed that his job search ceased on March 5, 2014. He believed that he searched for about 14 days.

The pertinent medical record reflects that, on December 28, 2011, Dr. Charles Joseph, neurologist, began treating the claimant for "a closed head injury of significance with subarachnoid and subdural blood present on the initial scans with persistence of headache, left facial weakness, and nystagmus and the left lateral gaze. His symptoms suggest the possibility of a mild brain stem contusion." (Cl.'s Ex. 1; Defs.' Ex. 1.) Dr. Joseph monitored the claimant's care through March 6, 2012 and released him to regular employment.

The claimant returned to Dr. Joseph on August 28, 2013. The claimant informed Dr. Joseph about making several mistakes at work. Dr. Joseph commented:

² The claimant was 60 years old at the time of the hearing.

[H]e . . . [was] referred to educational counselor to look into the issues regarding memory and thinking. He is now referred on to see a clinical psychologist for neuropsychiatric battery . . . From a practical standpoint proceeding on with the plan for neuropsychiatric testing is a good one and recommended that he follow through. . . . If he has specific attention span issues documentable by formal neuropsych testing, certainly the possibility of causation from his previous closed head injury must be strongly considered. The patient will get back to us should it be necessary. At the moment, I have no other suggestions.

On September 2, 2013, Dr. Conley evaluated the claimant and administered multiple diagnostic tests.³ He assessed that the claimant suffered functional deficits, such as impaired mental tracking, impaired self-sustained attention, mental inertia, impaired volition and poor impulse control. Dr. Conley's diagnoses included dementia as a result of the head trauma and a traumatic brain injury with a brain stem injury. Dr. Conley concluded that the claimant's "identified neurocognitive deficits almost certainly account for his reported breaches of protocol on the job over the past 1 ½ years." On January 16, 2014, Dr. Conley suggested that the claimant seek specialized treatment. He explained:

[The claimant] would best benefit and, therefore, requires the kind of treatment that is provided by experts in treating traumatic brain injury such as is provided by Gregory O'Shanick, M.D. and his team, at the Center for Neurological Services in Richmond, VA. To my knowledge, [the claimant] has not received such treatment to date because such treatment is simply unavailable in the immediate Lynchburg area.

On January 23, 2014, Dr. Edward Peck, neuropsychologist, performed an independent examination of the claimant. Dr. Peck concluded that the claimant suffered a head trauma during the occupational injury yet had "made an excellent medical recovery" and returned to work. Dr. Peck denied that the claimant suffered any psychological problems or disability from

³ The employer referred the claimant to its Employee Assistance Program administrator as a result of "on-going safety and performance concerns" regarding his work. The program sent the claimant to Dr. Conley for neuropsychological evaluation. (Cl.'s Ex. 4.)

employment as a result of the work-related injury. Dr. Peck concluded that the claimant's other health issues -- such as cardiac disease, fatigue and thyroid cancer -- could produce changes in his thinking and ability to following protocols at work.⁴

Dr. O'Shanick examined the claimant on March 5, 2014. The claimant described the occupational accident and currently suffering various problems, such as short-term memory loss, increased agitation, difficulty completing tasks, headaches and loss of focus. Dr. O'Shanick's diagnoses included a traumatic brain injury, with multiple cognitive deficits, secondary to the occupational accident. Dr. O'Shanick recommended diagnostic studies, medications and consultations.

On March 20, 2014, Dr. Conley issued his critique of Dr. Peck's evaluation. Dr. Conley discussed numerous flaws with Dr. Peck's analysis, including a failure to consider the relevant test data and an omission of the claimant's history and post-injury deficits.

Dr. Conley testified by deposition taken on March 24, 2014. (Defs.' Ex. 2.) Dr. Conley agreed that the nature of the claimant's protocol infractions at work before and after the fall were similar. However, he emphasized the dramatic increase in frequency of the infractions after the accident. Dr. Conley disputed that the claimant could work. Dr. Conley acknowledged that his professional license was placed on probation in 2007.

By letter dated April 21, 2014, Dr. O'Shanick advised that he evaluated the claimant on March 5, 2014 and that, "[f]ollowing this evaluation, I have determined that Mr. Moran is unable

⁴ By letter dated February 26, 2014, the claimant's cardiologist denied that the claimant suffered any neurological problems following his coronary artery disease and stent placement and that it "would be extremely unlikely" that cognitive issues resulted from his stable cardiac condition. By letter dated March 18, 2014, the physician who treated the claimant's thyroid nodule denied that this condition would cause any cognitive impairment.

to work in any employment setting due to persistent and permanent deficits following his traumatic brain injury.”

Dr. Murray Joiner performed an independent medical examination on May 30, 2014. He concluded that the claimant suffered cognitive limitations but had the capacity to perform some employment with restrictions.

Dr. David Ross, neuropsychiatrist, examined claimant on June 16, 2014 and extensively reviewed his medical and employment history. Dr. Ross concluded that the claimant suffered a mild traumatic brain injury during the occupational fall.⁵ Dr. Ross assessed that probably the work-related injuries “contributed modestly” to the claimant’s infractions at work after the accident. Dr. Ross opined that the claimant could perform modified employment.

Dr. O’Shanick testified by deposition taken on June 16, 2014. (Cl.’s Ex. 3.) He agreed to diagnosing the claimant as suffering a moderate traumatic brain injury. He denied that the claimant was capable of employment. Dr. O’Shanick agreed with the conclusions of Dr. Conley and characterized Dr. Peck’s assessment as “completely unfounded.” (Dep. 95.)

III. Findings of Fact and Rulings of Law

A. Traumatic Brain Injury

On appeal, the defendants rely upon the opinion of Dr. Peck and assert that the evidence failed to prove that the claimant suffered a traumatic brain injury. We have carefully considered the medical evidence in this case. We find no error in the Deputy Commissioner affording more probative value to the conclusions of Drs. Conley, O’Shanick and Ross over the contrary opinion of Dr. Peck.

⁵ Dr. Ross denied that the claimant suffered a psychological injury.

B. Drs. Conley and O'Shanick

On appeal, the defendants maintain that treatment provided by Drs. Conley and O'Shanick was not reasonable, necessary, causally-related to the incident, nor authorized. The defendants also argue that a provider closer in proximity to the claimant's residence should be the treating physician, as opposed to Dr. O'Shanick. As stated above, we agree with the finding that the claimant proved that he suffered a causally-related traumatic brain injury and we disagree that treatment of such is unnecessary. Additionally, we agree that the defendants disputed responsibility for the traumatic brain injury. Accordingly, the claimant could seek medical treatment on his own for which the defendants are now found to be responsible. Moreover, the record illustrated that an authorized treating physician – Dr. Joseph – agreed with the referral of the claimant to Dr. Conley who in turn made a referral to Dr. O'Shanick. The claimant maintained a proper referral of physicians as he sought specialized treatment.

Regarding the reasonableness of the travel distance, the Deputy Commissioner found the following:

If claimant's injuries were uncomplicated and the treatment provided by Dr. O'Shanick common, the defendants' position may have merit. See Allen v. Wright's Buick, Inc., No. 1861-08-4 (Va. Ct. App., Mar. 17, 2009). However, Dr. Conley has addressed the need for specialized care of the sort experts like Dr. O'Shanick can deliver. The required treatment could not, by Dr. Conley's estimation, be found in the immediate Lynchburg region.

We are without evidence tending to credibly challenge Dr. Conley's belief. Absent some contest, we will not simply disregard the neuropsychological recommendation. We cannot agree with the defendants' unsupported proposition: that a geographically closer doctor could necessarily offer claimant the same required unique care. Given Dr. O'Shanick's particular qualifications and experience, recognizing Dr. Conley's assertions, we find reasonable, in this instance, the modest distance claimant willingly traveled.

(Op. 14.) We find no error.

C. Disability Prior to April 21, 2014

On appeal, the claimant argues that he was partially disabled and reasonably marketed his residual work capacity from February 10, 2014 through March 5, 2014 and that, by March 5, 2014, he was excused from all employment.⁶ We agree in part.

The Deputy Commissioner noted that, after the partially-disabled claimant began his job search on February 10, 2014, he lacked persuasive information and documentation regarding his efforts. We defer to this conclusion. However, after careful review, we find that the evidence preponderates that Dr. O'Shanick restricted the claimant from all employment effective March 5, 2014. The claimant testified to being excused from work after Dr. O'Shanick's first or second examination. Most significantly, Dr. O'Shanick's handwritten notes of March 5, 2014 advised "Currently – unable to work" and his letter of April 21, 2014 reiterated the removal. Furthermore, as stated below, Dr. Conley opined that the claimant was totally disabled during his March 24, 2014 deposition. Accordingly, we REVERSE the denial of wage loss benefits prior to April 21, 2014 and MODIFY the lower award to begin the payment of temporary total disability benefits effective March 5, 2014.

D. Disability After April 21, 2014

The defendants assert that the claimant was capable of at least light duty and failed to market his residual work capacity. Again, the Deputy Commissioner afforded weight to the opinion of Dr. O'Shanick, and this physician excused the claimant from employment. The

⁶ The claimant did not dispute the denial of temporary total disability benefits from August 23, 2013 through February 9, 2014. We omit discussion of this issue.

removal was also supported by Dr. Conley during his deposition. We find no error in the weighing of the medical evidence and the awarding of temporary total disability benefits.

IV. Conclusion

The Deputy Commissioner's September 23, 2014 Opinion is AFFIRMED in part and REVERSED in part. We MODIFY the lower award to begin the payment of temporary total disability benefits effective March 5, 2014.

From accrued compensation, an attorney's fee in the total amount of \$4,350, which includes the \$4,050 awarded by the Deputy Commissioner below, is awarded to Robert E. Evans, Esquire, for legal services rendered the claimant.

Interest is payable on the Award pursuant to Va. Code § 65.2-707.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.